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No. 05-184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF FORMER ATTORNEYS GENERAL OF THE UNITED STATES, RETIRED AND FORMER MILITARY OFFICERS, AND FORMER ASSISTANT ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici the Honorable William P. Barr, the Honorable Edwin Meese III, and the Honorable Dick Thornburgh are former Attorneys General of the United States.

Amicus the Honorable Charles J. Cooper is former Assistant Attorney General for the Office of Legal Counsel.

Amicus General P.X. Kelley, USMC (Ret.) was Commandant of the Marine Corps and a Member of the Joint Chiefs of Staff from 1983 to 1987. He served two command tours in the Republic of Vietnam.

Amicus Professor Joseph Zengerle served in the Army as special security assistant to the Commander, U.S. Military Advisory Command, Vietnam, during the Tet Offensive and as a unit commander with the Americal Division in 1968.

Amici have a substantial interest in this case, which if wrongly decided, could impair our Nation's ability to defend itself from external threats in general and to defeat al Qaeda in particular. *Amici* collectively have served this Nation over more than five decades in high-ranking positions in the Executive Branch during both war and peace and thus have a unique understanding of the Executive's wartime duties and needs.

Both civilian and military *amici* share the belief that the President possesses the constitutional authority to convene military commissions as an inherent part of his power to command military operations in time of war. Use of such

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Counsel for Petitioner has filed a letter with the Court consenting to all *amicus* briefs. Counsel for Respondents has consented to the filing of this brief, and that letter is contemporaneously being filed with the Clerk of the Court. No counsel for a party has written this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

commissions is critical to the President's ability to protect both military and civilian targets from enemies – such as al Qaeda – who deny the fundamental distinction for purposes of military action between an ammo dump and an office tower.

Our Constitution establishes domestic law enforcement and national defense as separate spheres of Executive action, with different purposes, different powers, and different degrees of authorized involvement by the two other Branches of Government. The Framers created a Chief Executive, answerable to the entire body politic, and assigned him both the duty and the power to defend that body politic from all armed aggression from abroad. The Framers' decision must be respected today, and the President must be given the discretion to choose the military and diplomatic strategy he and his advisors believe will best protect the Nation and defeat our enemies. The use of military commissions to punish and deter violations of the laws of war is part of the battle plan itself. The form and function of such tribunals are a matter of Executive discretion – no more or less than questions of troop strength or choice of weaponry – and their control must remain entirely within the chain of military command.

For these reasons, *amici* respectfully file this brief in support of Respondents and urge the Court to affirm the judgment below.

SUMMARY OF ARGUMENT

Petitioner's legal attack upon the use of military commissions to try and punish captured al Qaeda combatants stems from a fundamentally misguided reading of the Constitution. Petitioner and supporting *amici* seek to take the vast body of this Nation's domestic criminal justice law – developed for the protection of our citizens against

government overreaching – and transpose it wholesale into the context of waging war against a foreign enemy.

The result is untenable in both theory and practice: Our domestic law becomes a sword in the hands of our enemies, and our judicial system is pressed into operation to insulate our enemies from the Commander-in-Chief's use of the traditional incidents of war against them. The Bill of Rights was designed to protect "THE PEOPLE," who came together "to form a more perfect Union," U.S. CONST. pmbl., from abuses of domestic law enforcement authority – it was in no way intended to constrain the new government's ability to defend itself from foreign aggressors.

The Constitution deliberately tempers the ability of the Executive Branch to adjudicate and punish violations of our domestic laws. In many cases, the Executive is subject to judicial oversight and control when acting to detect and punish domestic lawbreakers. The subjective views or policy judgments of the Executive are largely irrelevant in the criminal realm – he must marshal objective evidence to satisfy rigorous standards of proof, including proof of guilt beyond a reasonable doubt. The judgment of our Framers in this domestic realm is that some measure of efficiency should be sacrificed to avoid an unacceptable form of "collateral damage," *viz.*, the wrongful conviction and punishment of an innocent citizen.

The prosecution of war against hostile forces attacking the body politic itself is an entirely different matter. In this limited but crucial context, the Executive's power and discretion must be plenary. In this realm, the Constitution is not concerned with diffusing governmental power or placing "checks" on the ability of the Commander-in-Chief to take swift and decisive action against the enemy. The Framers concentrated military power for national defense in a Commander-in-Chief, who alone stands politically accountable to the entire Nation. The Executive's war powers are not subordinated to any goal other than the defense and survival of the Republic and, as the title

Commander-in-Chief makes clear, no legislative or judicial authority can "review" the President's military judgments. Thus, the Constitution commits to the President's experience and judgment questions of military and diplomatic strategy so as to promote an effective and swift response to enemy attacks.

The Framers' commitment to a single line of command ending in one politically accountable Commander-in-Chief was born of recent and painful experience with attempts by the legislative body to dictate the prosecution of the Revolutionary War. *See* Henry Cabot Lodge, GEORGE WASHINGTON 170 (1899) (General Washington "was obliged . . . to teach Congress how to govern a nation at war. In the hours allotted to sleep, he sat in his headquarters, writing a letter, with blots and scratches, which told Congress with the utmost precision and vigor just what was needed.") (internal quotation marks omitted). The Articles of Confederation, with no Chief Executive and the war powers divided between the national legislature and state governors, were almost universally regarded as an object lesson in how *not* to structure national defense.

Article II, section 2's declaration that the President shall be Commander-in-Chief of all armed forces at the Nation's disposal is much more than the appointment of a chief military commander. The Commander-in-Chief has the duty and obligation to use military force to defend the Nation from foreign attack and to destroy those who wage war upon it. Our Framers were well aware that not every war is declared and not every enemy comes in full uniform after a formal rupture of diplomatic relations. With control of the diplomatic corps and the military power, comes the duty and obligation to prepare for and defend against any form of foreign aggression. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *The Prize Cases*, 67 U.S. 635, 668 (1862). Thus, even aside from any Congressional authorization, the President as Commander-in-Chief has inherent authority to respond to al Qaeda's unprovoked aggression against us, including the use of military commissions against al Qaeda operatives.

Once a state of war exists – whether through formal declaration or the necessity of immediate reaction to foreign attack – the President has exclusive authority over the means by which the war is prosecuted by our armed forces. *Ex parte Quirin*, 317 U.S. 1, 28 (1942). The President thus has at his disposal all the incidents of war, *see, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality); *id.* at 587 (Thomas, J., dissenting), and neither the Legislative nor Judicial Branches can interfere with his decisions regarding the tools to be used and the objectives to be set for military action.

One well-recognized incident of the President's authority to wage war is the authority to convene and set the terms of military commissions to try enemy combatants for offenses against the laws of war. *See, e.g., Quirin*, 317 U.S. at 28-29. Such commissions are *military* tools for performing *military* functions. They are the means by which the military commander seeks to control the actions of enemy forces on the field of battle. Such commissions also protect the discipline and morale of our own troops, by assuring them that *the army to which they belong is capable of punishing acts of unlawful combatants against its members*. Divesting the Executive Branch of that authority by displacing any part of it to Article III courts is contrary to our constitutional design. The Commander-in-Chief need not seek a "warrant" or a "show cause order" from a domestic court in order to try, convict, and summarily punish foreign combatants who abuse a flag of truce or attempt to infiltrate our lines in the uniform of our own forces.

Finally, this Court should emphatically reject Petitioner's effort to seek judicial enforcement of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. The President's power to determine the form and composition of military tribunals, according to military need and exigency, is not subject to judicial constraint by law or treaty. Al Qaeda operatives are not entitled to the protections contained in the 1949 Geneva Convention. Al Qaeda is not a "High Contracting Party" and thus does not obtain the benefits available to the

signatories. Further still, to qualify for this privileged status al Qaeda – as a "group" – must meet certain minimal criteria such as adhering to a chain of command, wearing insignia, openly carrying arms, and refraining from attacks on civilians. Al Qaeda fails to meet any of these obligations. Such an enemy to mankind is not entitled to "prisoner of war" status, and according it such status would undermine the very purposes underpinning the Geneva Conventions.

ARGUMENT

I. Petitioner Confuses Domestic Criminal Law And The Tools of War.

This Nation's domestic criminal justice regime and war fighting apparatus operate in wholly distinct constitutional realms. In the realm of civilian law enforcement, the government's role is disciplinary -- punishing an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that, in the name of maintaining domestic tranquility, an overzealous government could oppress the very body politic it is meant to protect. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 895 (1975) (explaining that the "central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials"); *Perpich v. United States Dep't of Def.*, 880 F.2d 11, 24 (8th Cir. 1989) ("Strange as it may now seem, the Framers feared that if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens.").

As the Framers rightly understood, the government itself could oppress American citizens, and thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. *See, e.g., Bloom v. Illinois*, 391 U.S. 194, 209 (1968)

("Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution."). To this end, both the Constitution as originally ratified and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive authority. *See, e.g., Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [trial-by-jury] clause was clearly intended to protect the accused from oppression by the Government.").

In this realm, the Executive's subjective judgments are immaterial; he must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. *See In re Winship*, 397 U.S. 358, 363 (1970) ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."). The underlying premise is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty. *See id.* at 372 (Harlan, J., concurring) (holding that "a fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free"); *see also* T. Starkie, LAW OF EVIDENCE 756 (1824) ("The maxim of law is that it is better that ninety-nine . . . offenders should escape than that one innocent man should be condemned.").

The calculus is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to

sanction an errant member of that body; it is exercising its national defense powers to preserve the very foundation of all our civil liberties. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) ("What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters.").

Here, the Constitution is not concerned with handicapping the government to preserve other values. Rather, it is designed to maximize the government's efficiency to achieve victory and to defeat or destroy its enemies. Indeed, as the Constitution explicitly recognizes, protecting the Nation from attack represents one of the paramount obligations of the Federal Government. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion* . . . .") (emphasis added); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.") (internal citations omitted).

The type of military judgments at issue here *viz.* – what and who poses a threat to our military operations or domestic security and how such threats should be deterred or neutralized – are quintessentially Executive in nature. These judgments must be made rapidly, based on military and diplomatic intelligence, and are not amenable to the type of process normally employed in the domestic law enforcement arena. They cannot be reduced to neat legal formulae, purely objective tests, or evidentiary frameworks, but instead require the exercise of judgment tempered by experience and the weighing of multifarious and sometimes conflicting military and diplomatic objectives. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (explaining that when conditions require the "exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has

placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs").

It is for precisely these reasons that the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. If the concept of Commander-in-Chief means anything, it must mean that the office holds the final authority to direct how, and against whom, to apply military power to achieve the military and political objectives of the campaign. The Founders intended the federal Government in general, and the Commander-in-Chief in particular, to possess and exercise all authority necessary to protect and defend the Nation. *See, e.g.*, THE FEDERALIST No. 23 (A. Hamilton) (explaining that the federal Government will be "cloathed with all the powers requisite to the complete execution of its trust"); *id.* No. 41 (J. Madison) ("Security against foreign danger is one of the primitive objects of civil society . . . . The powers requisite for attaining it must be effectually confided to the federal councils."); *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (holding that "this [constitutional] grant of war power includes all that is necessary and proper for carrying these powers into execution") (citation omitted).

For these reasons, the form and functions assigned to military commissions convened by the President pursuant to his Commander-in-Chief authority lie outside the traditional constraints of the judicial system. For example, this Court has held that according the protections of the Fifth Amendment to non-citizen enemy combatants would "put[] them in a more protected position than our own soldiers . . . . It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies." *Id.* at 783; *see also Burns v. Wilson*, 346 U.S. 137, 152 (1953) (Douglas, J., dissenting) (agreeing with majority that "[o]f course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. That is the meaning of *Ex parte Quirin*.").

Indeed, military commissions and trials of enemy combatants involve determinations that partake more of political questions than those that are traditionally viewed as justiciable in Article III courts. *Eisentrager*, 339 U.S. at 773 (basing the "Executive constraint of enemy aliens, not on the basis of individual prepossessions for their native land but on the basis of political and legal relations to the enemy government"); *cf. Ex parte Kumezo Kawato*, 317 U.S. 69, 75 (1942) ("The ancient rule against suits by resident alien enemies has survived only so far as necessary *to prevent use of the courts to accomplish a purpose which might hamper our own war efforts* or give aid to the enemy.") (emphasis added). Hence, the Judicial Branch must take care not to overstep its role in the quintessentially political decisions that military action demands. *See Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973) ("Ever since *Marbury v. Madison* . . . the federal courts have declined to judge some actions of the Executive and some interaction between the Executive and Legislative branches where it is deemed inappropriate that the judiciary intrude.").

Interposing any form of "judicial review" on the President's design and selection of a tool of war is fundamentally inconsistent with our constitutional design. It diffuses power and responsibility where the Framers deliberately united it in one Chief Executive. It raises a judicial body above the "Commander-in-Chief" in making judgments regarding how best to meet and defeat the enemy. It also weakens our military by undermining the ability of our armed forces to defend themselves against unlawful combatants. Military commanders need not and should not have to seek some form of Article III sanction before meting out swift military justice to foreign aggressors who abuse the flag of truce, infiltrate our lines in the uniform of our own forces, or otherwise attempt to defeat our forces through violations of the laws of war. *See Quirin*, 317 U.S. at 37 ("[E]ntry upon our territory in time of war by enemy belligerents . . . for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It

subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents.").

No doubt, a German tourist lawfully in New York, has the same rights as a United States citizen should the State of New York charge him or her with a domestic crime. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). But it should be equally without doubt that a German national attempting to infiltrate our lines in time of war can be summarily tried and executed by the military, without any involvement of the domestic courts. *See, e.g., Witness to History: A Soldier Recalls the Battle of the Bulge*, St. Paul Pioneer Press (Dec. 12, 2004) ("[A]t Malmedy, Belgium, more than 80 [Americans] were machine-gunned by Waffen SS soldiers in one of World War II's most notorious battlefield atrocities. Meanwhile, English-speaking Germans in American uniforms had slipped through U.S. lines, hoping to create chaos. Some were caught and at least 18 executed as spies.").

The President and his military subordinates have carefully screened those individuals who will be subject to military tribunal. They are all foreign nationals, who have been apprehended by the United States military or its military allies in the field of battle. None has any voluntary association with the United States and none can claim to have either explicitly or implicitly sought the rights and obligations of those lawfully present in the United States. For all these reasons, the use, scope, procedures, and punishments of military tribunals must remain entirely matters of executive discretion precisely because those determinations must vary depending on the exigencies of the conflict itself.

II. The President Possesses Independent Constitutional Authority To Employ Military Commissions As An Instrument Of Waging War.

Under our constitutional design, the Executive's paramount obligation is to protect the Nation from armed attack. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (noting that the President has "unique responsibility" for the conduct of "foreign and military affairs"). The Constitution provides the Executive all necessary authority to fulfill this duty. *See* U.S. CONST. art. II, § 2, cl. 1; THE FEDERALIST No. 74 (A. Hamilton) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."); *see also Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005) ("Article II . . . provides allocation of foreign relations and national security powers to the President, the unitary chief executive."). Hence, "[t]he President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ-in foreign affairs." *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948).

Accordingly, the Constitution invests the Executive with the singular authority to wage war. "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. 635, 668 (1862).[2]

The Constitution's text, historical evidence, and this Court's precedent make plain that the President's Commander-in-Chief obligations do not cease once a particular battle concludes or

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[2] *See Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.").

once a particular faction of the enemy is defeated. "The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . the evils which the military operations have produced." *In re Yamashita*, 327 U.S. 1, 12 (1946); *see also Quirin*, 317 U.S. at 28-29 (stating the President has the power "not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war"). Consequently, "the power to wage war successfully . . . is not restricted to the winning of victories in the field and the repulse of enemy forces" but "extends to every matter and activity so related to war as substantially to affect its conduct and progress." *Hirabayashi*, 320 U.S. at 93.

The power to "wage war successfully" necessarily includes determining how to manage captured enemy combatants – lawful or otherwise. *See Madsen v. Kinsella*, 343 U.S. 341, 348 n.10 (1952) ("'A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law.'") (quoting Judge Advocate General Crowder, S. Rep. No. 130, 64th Cong., 1st Sess. 40.).[3] Throughout the last two Centuries, this Court has recognized military commissions "even after peace has been declared, pending complete establishment of civil government." *Id.* at 348 n.12 (citing Supreme Court decisions from World War II, the Spanish-American War, the Civil War, and the Mexican-American War). Indeed, this Court has made clear that managing the enemy once captured falls within the "urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms." *Id.* at 348. The

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[3] This proceeding does not raise the same constitutional concerns that arose in the context of *Ex parte Milligan*, 71 U.S. 2 (1866), and other proceedings surrounding the trial of President Lincoln's assassins. Those proceedings implicated the interests of *American citizens*. By contrast, Mr. Hamdan's sole connection to the United States arises from his desire to destroy it.

military, under the President's command, therefore must attend to the battlefield, determine how best to respond to casualties, and decide how to process those captured or killed on the battlefield. *Duncan v. Kahanamoku*, 327 U.S. 304, 342 (1946) ("The conduct of war under the Constitution is largely an executive function. Within the field of military action in time of war, the executive is allowed wide discretion.").[4]

This day-to-day authority over the Armed Forces and matters of national defense carries with it a much-needed flexibility. Consequently, commissions "have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth." *Madsen*, 343 U.S. at 347-48. Again, writings accompanying the Constitutional debates discuss the need for Executive flexibility: "With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety." THE FEDERALIST No. 41 (J. Madison); *see also id.* No. 23 (A. Hamilton) ("The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.").

Once our military forces have been engaged, it lies with the Executive to choose among the various tools of war, including manpower, weaponry and the proper response to an

[4] Such fundamental responsibility contrasts with questions regarding whether the Executive has the right to use the most efficient means to satisfy a more attenuated need such as obtaining ordinance or military equipment, undertakings that arguably impinge on Congress's power over the raising of armies and appropriations generally. *See Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) ("While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.").

enemy's violations of the laws of war. The authority to establish and use military commissions is an inherent part of the power to command military operations. Such commissions are *military* tools for performing *military* functions. They are the means by which the military commander seeks to control the actions of enemy forces on the field of battle. By demonstrating swift punishment of those who perpetrate offenses against our troops or nationals, the Commander deters the enemy from such conduct in the future. In addition, the Commander must be able to demonstrate to his own forces that the military is capable of defending its own from acts of unlawful combat. Requiring an appeal to some civilian authority undermines military morale and may encourage our troops to take matters into their own hands. In this way, the military commission is as integral a tool of war as any weapon system, piece of ordinance, or military maneuver. *See* On the Constitutional Power of the Military to Try and Execute the Assassins of the President, Opinion of Attorney General James Speed at 7 (July 1865) ("The commander of any army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles.").

Indeed, as Attorney General Speed noted in his oft-quoted opinion on the subject, the military commission constitutes a more calibrated response to offenses against the laws of war, which developed over the last several centuries. Prior to their development, it was well recognized that such "banditti that spring up in time of war are respecters of no law, human or divine, of peace or war" and were therefore considered "*hotes humani generic* and may be hunted down like wolves." *Id.* at 8. There was no obligation to risk the lives of one's own forces to take them prisoner; rather: "Those who declare war against the human race may be struck out of existence as soon as apprehended." *Id.* at 7. The military tribunal developed as a more calibrated tool to replace outright extermination. But that tool is still fundamentally military in nature and still within the full discretion of the Commander in terms of composition and

process. Thus, George Washington's order that two officers of the rank of Captain try Major Andre as a spy was a lawful order – as was his execution – without any review by any civilian court. *Ex parte Milligan*, 71 U.S. 2, 14-15 (1866) (holding that the commander "must commit to his officers, and in practice, to a board of officers, as a tribunal, by whatever name it may be called, the charge of examining the circumstances and reporting the facts in each particular case, and of advising him as to its disposition – the whole matter to be then determined and executed by his order") (citing Examination of Major Andre before board of officers, Colonial pamphlets, vol. 18).

III. Congress Employed The Full Extent Of Its War Power To Support The President's Constitutional Use Of Force.

Petitioner responds to this well settled understanding of the President's power and obligation to defend the Nation by overstating Congress's Article I power to "declare war." The power to "declare war" simply represents the authority to determine whether to enter into a war of aggression in the first place. *See Massachusetts v. Laird*, 400 U.S. 886, 893 n.1 (1970) ("An early draft of the Constitution vested in Congress the power to 'make' war rather than the power to 'declare' war. The change from 'make' to 'declare' was intended to authorize the President the power to repel sudden attacks and to manage, as Commander in Chief, any war declared by Congress."); *Khalid v. Bush*, 355 F. Supp. 2d 311, 318 n.7 (D.D.C. 2005) ("Ultimately . . . the Framers gave Congress the power to 'declare' war in order to avoid any confusion over the President's ability to wage or prosecute the war.").

Ignoring this critical distinction, Petitioner incorrectly points to a variety of Congressional powers from Article I, Section 8 – including its power to discipline the military and to create inferior tribunals to the Supreme Court – to suggest that Congress possesses general and broad powers to interfere in the prosecution and management of war. *See* Brief of Petitioner

at 11-12, *Hamdan v. Rumsfeld*, No. 05-184 (Jan. 6, 2006) ("Pet. Brief"). This ham-fisted approach attempts to expand the limited and established meaning of "declare" and ignores its specific role within the Constitution's text. *See* John Yoo, THE POWERS OF WAR AND PEACE 145 (2005) ("At the time of the Constitution's ratification, 'declare' carried a distinct and separate meaning from 'levy,' 'engage,' 'make,' or 'commence.'").

Both in enumeration of military powers generally and in Congress's legislative powers specifically, the Constitution is carefully crafted to make plain that the power to "declare" does not reach the management and direction of military efforts. For this reason, when the Constitution barred the states from undertaking military action without express Congressional consent, it employed the broader word "engage" rather than merely forbidding the states from "declaring" war. *See* U.S. CONST. art. I, § 10 (barring the states from "engag[ing] in war" without express Congressional consent).

The Constitution's use of "declare" likewise contrasts sharply with other phrases contained in Article I, Section 8 that empower Congress to exercise considerably more meticulous and continued involvement. For example, to "*regulate* commerce with foreign nations" and "*promote* the progress of science and useful arts," Congress must exercise a continuing role to evaluate its progress. To "define *and punish* piracies and felonies committed on the high seas," Congress must take action beyond merely making a diplomatic statement. Additionally, the very words contained in the same clause as Congress's power to "declare" illustrate its limited reach. If "declare" gave Congress the broad power that Petitioner suggests, the Constitution would not need to list the more specific powers of "grant[ing] letters of marque and reprisal, and mak[ing] rules concerning captures on land and water."[5]

[5] "[W]ords and people are known by their companions." *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (citing *Gustafson v. Alloyd Co.*, 513

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The power to declare war consequently does not require Congress to authorize individually the specific, incidental war powers the President possesses. Rather, "it [is] only in the case of a war of aggression that the power of Congress must be affirmatively asserted to establish its legal existence." William Howard Taft, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES, AND ITS LIMITATIONS 86 (1916); *see also Campbell*, 203 F.3d at 26 (Silberman, J., concurring) ("Even assuming a court could determine what 'war' is, it is important to remember that the Constitution grants Congress the power to declare war, which is not necessarily the same as the power to determine whether U.S. forces will fight in a war.").[6]

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U.S. 561, 575 (1995)); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim noscitur a sociis, . . . while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth[.]").

[6] As Chief Justice Taft explained in another noted test of Congress's power to interfere with Executive authority:

> The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.

Myers v. United States, 272 U.S. 52, 128 (1926). Just as the Court rejected an argument that a shared constitutional power (the appointment of Executive officers) granted Congress a role in the unstated but nonetheless exclusive Executive prerogative to terminate those officers, so too should the Court reject the proposition that the shared constitutional power to enter into a war of aggression allows Congress to interfere with the President's singular power to wage that war.

This failure to understand the limited reach of Congress's military authority leads Petitioner to the erroneous conclusion that Congress must not only "declare" war but also *explicitly* authorize the creation of military commissions. *See* Pet. Brief 11-18. In essence, Petitioner asserts that, in addition to requesting a grant of military authority, the President must separately ask Congress exactly how he should deal with enemy combatants and violators of the laws of war. In fact, the exact opposite is true: "In general, however, [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial." *Madsen*, 343 U.S. at 347 n.9 (quoting William Winthrop, MILITARY LAW AND PRECEDENTS, 831 (2d ed. 1920 reprint)).

Indeed, this Court – including five Justices in *Hamdi* – has repeatedly held that a President may capture, detain, *and try* unlawful combatants pursuant to a general authorization of force. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'") (quoting *Quirin*, 317 U.S. at 28); *id.* at 587 (Thomas, J., dissenting) (sharing this view of Presidential power to convene military commissions); *see also Dames & Moore v. Reagan*, 453 U.S. 654, 678 (1981) ("Such failure of Congress specifically to delegate authority does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.") (internal quotation marks and citations omitted).[7]

[7] This Court must construe any legislation designed to undercut the Executive's independent constitutional authority to convene military commissions in a limited fashion. Legislation that interferes with power that is textually committed to the Executive Branch raises grave constitutional concerns. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983)

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Congress concurred in the President's regular use of military commissions by unanimously enacting the expansive and forceful AUMF. *See Yamashita*, 327 U.S. at 12 (explaining that the President may act "*at least* in ways Congress has recognized") (emphasis added).[8] The AUMF, by its plain terms, expresses Congress's intention that the Executive should employ the full range of Article II power to wage war against al Qaeda. The AUMF broadly empowers the President "to use *all necessary and appropriate force* against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ." 107 Pub. L. No. 40 § 2(a), 115 Stat. 224 (emphasis added); *see also Dames & Moore*, 453 U.S. at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility[.]") (internal quotation marks and citation omitted).

The AUMF shows substantial deference to the Executive in at least three ways. First, Congress empowered the President "to use *all* necessary and appropriate force," without limiting the Executive by defining either "necessary" or "appropriate." Second, the AUMF specifically left the *Executive* with the obligation to determine whom to attack. *Id.* (authorizing the President to use force "against those nations, organizations, or

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(invalidating legislation granting Congress a legislative veto); *Myers*, 272 U.S. at 176 ("[T]he Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.").

[8] *See* 147 Cong Rec. S-9421 (2001) (AUMF passed the Senate with 98 yeas and 0 nays); 147 Cong Rec. H-5683 (2001) (AUMF passed the House by unanimous consent).

persons *he determines* planned, authorized, committed, or aided the terrorist attacks"). Third and most importantly, the AUMF does not limit, in any way, the President's aforementioned obligation to manage military operations.

Through such broad language, Congress endorsed the full range of the Executive's Article II war-making powers, including the power to convene military commissions to process individuals such as Mr. Hamdan. The President's decision to commence military actions against, *inter alia*, Afghanistan arose out of this grant of authority. "There can be no doubt that individuals who fought against the United States in Afghanistan [in support of the] al Qaeda terrorist network responsible for [the 9/11] attacks, are individuals Congress sought to target in passing the AUMF." *Hamdi*, 542 U.S. at 518 (plurality). Establishing and setting the terms of military commissions naturally flows from the Congress's recognition of the Executive's war-making and war-managing authority. "[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." *Id.* at 519.

Although Congress's endorsement of the well established understanding of the President's war-making power should settle this issue, Petitioner claims that the Uniform Code of Military Justice ("UCMJ") implicitly repealed these established constructions of war declarations by applying its procedural guarantees to *all* military trials. *See* Pet. Brief at 2-3. Petitioner also asserts that the UCMJ has not authorized these kinds of commissions. *Id.* at 13-14. However, the UCMJ expressly *excludes* unlawful or enemy combatants – that is, those who are not prisoners of war – from its reach. *See* 10 U.S.C. § 802(a).

Moreover, in the cases cited *supra*, this Court has refused to apply language identical to that currently used in the UCMJ

to military commissions of individuals such as Mr. Hamdan. *See Yamashita*, 327 U.S. at 19 ("We think that neither Article 25 nor Article 38 [of the Law of War] is applicable to the trial of an enemy combatant by a military commission for violations of the law of war."). As *Yamashita* noted, *id.* at 7, Article 15 of the Law of War makes plain that it does not limit the jurisdiction or authority of military commissions: "provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." *See also Eisentrager*, 339 U.S. at 786 (noting that the Court has "held in the *Quirin* and *Yamashita* cases . . . that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war").

Given these decisions and this Court's recent and post-AUMF refusal to apply the UCMJ to a foreign enemy combatant in *Hamdi*, the UCMJ does not limit this Court's precedent regarding the President's authority to convene and shape military commissions. Additionally, reading the AUMF to require Congressional micromanagement of the Executive's obligation to wage war would run contrary to our constitutional design. *See Dames & Moore*, 453 U.S. at 678 ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act.").

Thus, far from supplying any sort of clear statement restricting the Executive's war-making power – that would itself raise a serious constitutional question[9] – the AUMF generally

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[9] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *See, e.g., Edward J. DeBartolo*

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and broadly sanctions the Executive's exercise of the full range of his Commander-in-Chief powers to wage war against those who planned, authorized, committed, or aided the 9/11 terrorist attacks. The authorization to use "all necessary and appropriate force" certainly does not limit the President's inherent Article II powers but rather affirmatively illustrates Congress's desire for the President to manage all aspects of the planning, execution, and completion of military operations. Consequently, as recognized by the AUMF, the President may convene and establish military commissions to try non-citizen combatants for war crimes.

IV. The Third Geneva Convention Does Not Confer Private Rights Of Action Upon Al Qaeda Operatives In The Courts Of The United States.

Petitioner incorrectly asserts that he is entitled to the protections of the Geneva Convention. The President correctly concluded that foreign al Qaeda operatives do not qualify for privileged status under the Geneva Convention and is due substantial deference. *See El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *O'Connor v. United States*, 479 U.S. 27, 33 (1986) (finding that the Executive Branch's "consistent application" of a treaty is entitled to "great weight").[10] Indeed, deference is particularly fitting in the treaty

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Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

[10] Affording substantial deference to Executive interpretations of treaties comports with this Court's deferential review of executive statutory construction. *See More v. Intelcom Support Servs., Inc.*, 960

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context where the interpretive choice trenches on the Executive's core authority to govern the Nation's foreign affairs. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

Even without deference, however, the President's interpretation is undoubtedly correct. Al Qaeda is neither a "High Contracting Party" to the Convention nor a non-contracting party that "accepts and applies the provisions thereof." *See* Geneva Convention Relative to the Treatment of Prisoners of War, Art. 2, Aug. 12. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). Al Qaeda also does not qualify for the alternative set of protections contained in Article 3, which only apply to "a conflict not of an international character." *See* Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. Y.B. Int'l L. 294, 298-99 (1949) (explaining that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must normally mean a civil war").

In addition, al Qaeda operatives collectively do not qualify as "prisoners of war" because they do not as, *as a group*, meet the most basic requirement to trigger the benefits of the Convention. *See* GPW, Art. 4(A). Article 4 would require al Qaeda to meet four conditions to obtain its protections: establish

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F.2d 466, 471-72 (5th Cir. 1992) ("If ambiguities in statutes drafted by Congress are to be regarded as implicit delegations of authority to the Executive, there is no reason not to regard ambiguities in treaties as conscious delegations of authority to the very executive who co-drafted the treaties.").

a recognized chain of command; wear insignia; bear arms openly; and obey the laws of war. *See id.* Al Qaeda fails to satisfy *any* of the prerequisites. Rather, it makes no distinction between civilian and military targets, provides no quarter to its enemies, and exploits the distinction between civilian and military objectives wholesale.

Al Qaeda – as a group – thus operates outside the laws of war. *See* W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39, 62 (1977) (explaining that the "accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW"). Consequently, no individualized hearing is required to resolve Petitioner's status. *See* Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Law of Armed Conflict*, 55 A.F.L. Rev. 1, 52 (2005) ("A party to a conflict has never been expected to provide a summary art. 5 hearing to determine lawful or unlawful combatant status for every combatant it captures and holds. It would not be realistic or reasonable to do so.").[11]

V. Petitioner's Effort To Convert This War Into A Series Of Criminal Prosecutions Would Have A Devastating Effect On Our Ability To Defeat Al Qaeda.

The judicial regime sought by Petitioner also would substantially impair the current military effort against al Qaeda and its armed affiliates. Since the vicious and unprovoked attacks of September 11, 2001, the United States and its allies have made substantial progress in defeating al Qaeda. Military

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[11] Even if Petitioner was entitled to the "prisoner of war" protections of the Geneva Convention, the Convention is not self-executing and therefore does not create judicially-enforceable private rights of action. *See Eisentrager*, 339 U.S at 789 n.14 (1950); *see also Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972).

operations in Afghanistan have toppled a brutal theocratic regime that provided support and training grounds for al Qaeda. Further, with the cooperation of its allies, the United States has killed or captured a number of high-ranking members of al Qaeda, crippled the financial network that provides support for future attacks, and limited the capacity of terrorists to gain access to potentially catastrophic weapons of mass destruction.

The war against al Qaeda continues, however. Recent terrorist attacks in London, Istanbul, Riyadh, Amman, Madrid, Bali, and Jakarta, as well as the day to day attacks against school-children, government officials and U.S. military personnel in Iraq and Afghanistan demonstrate the continued effort of al Qaeda and its affiliates to strike at this country and its allies. Most recently, al Qaeda leader Osama bin Laden purportedly surfaced to claim that the organization "is making preparations for attacks on the United States." *Osama bin Laden Promises More Attacks on United States*, ABC News (Jan. 19, 2006), *available at* http://www.abcnews.go.com/International/story?id=1521491 (last accessed Feb. 23, 2006).

The President's Order establishing military commissions and the implementing regulations promulgated by the Secretary of Defense, Military Comm'n Order No. 1 (March 21, 2002) ("Order No. 1"), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last accessed February 23, 2006), strike a proper balance between the procedural protections that should be afforded non-citizen terrorists and the interest of National defense.[12] Providing non-citizen terrorists with greater

[12] The decision to try non-citizen terrorists before military commissions was made only after the President determined that the establishment of military commissions was necessary "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks . . . ." Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 1(e) (Nov. 13, 2001). In making this decision, the President "fully considered the magnitude of the potential deaths, injuries, and

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protections than currently contemplated will not measurably reduce the chances of errant prosecution. Rather, the current procedures for trying non-citizen terrorists provide the accused with a panoply of rights that ensure that the accused has an opportunity to know and defend against charges brought against him.[13]

Plaintiffs and supporting *amici* do not and cannot come to grips with the enormous harm that imposing certain constitutional requirements would have on the Executive's ability to wage war successfully. For example, requiring military commissions to apply an analogue of the Sixth Amendment's Confrontation Clause would substantially hinder military operations by removing front-line soldiers and officers from the battlefield to prepare and to offer testimony before a

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property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur." *Id.* § 1(g).

[13] Petitioner and *amici* also do not address the extensive procedural guarantees afforded an accused. The Secretary's order expressly guarantees the accused: the right to have written charges provided to him, Order No. 1, ¶ 5(A); the presumption of innocence until guilt is proven beyond a reasonable doubt, *id.* ¶ 5(B); the right to an attorney provided at no cost to the accused, *id.* ¶¶ 4(C)(2) & 5(D); access to the evidence intended to be introduced against the accused (with some exceptions for classified information), *id.* ¶ 5(H); the right to refuse to testify with no adverse inference to be drawn by a commission for exercising such right, *id.* ¶ 5(F); alternatively, the right to testify before the Commission, *id.* ¶ 5(G); the right to obtain and provide evidence and witnesses to support a defense, *id.* ¶ 5(H); and the right to be present at every stage of an open and public trial with some limitations intended to protect the non-disclosure of classified information and the safety of participants in the Commission's proceedings, *id.* ¶¶ 5(K)&(O).

tribunal.[14] *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53 (2004) ("In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."); *United States v. Derr*, 990 F.2d 1330, 1334 (D.C. Cir. 1993) (noting that the Confrontation Clause requires a court to give a defendant a "realistic opportunity to ferret out a potential source of bias" in his accuser).[15] From a purely practical standpoint, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account . . . and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Eisentrager*, 339 U.S. at 779.[16]

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[14] Other requested witnesses may include intelligence agents and sources whose identity – and even existence – are closely guarded secrets. Requiring these witnesses to appear in court heightens the possibility of their exposure, endangering the agent's safety and compromising this Nation's access to vital intelligence concerning the location of terrorist cells and plans for future terrorist strikes.

[15] *See also Eisentrager*, 339 U.S. at 779 (noting that granting a writ of habeas corpus "might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence").

[16] Limiting the accused's opportunity to demand the *physical* presence of combat personnel at military commissions does not mean that the accused is without a right to examine such witnesses – ¶ 6(D)(2)(a) of the Secretary of Defense's order provides an accused with an opportunity to call and examine witnesses, including (when relevant) combat personnel. The Order, however, authorizes the Commission to "permit the testimony of witnesses by telephone, audiovisual means, or other means . . . ." Order No. 1, ¶ 6(D)(2)(a). This is a common-sense limitation on the need to shuttle personnel in and out of military operations. Importantly, a prosecutor's use of such means to obtain testimony is limited by the Order. The Order provides that the commission "shall consider the ability to test the veracity of that testimony in evaluating the weight to be given the testimony of the witness." *Id.*

Petitioner and supporting *amici* also contend that an accused must have a right to be present at all phases of a proceeding. This Court has recognized the burdens that these and similar requirements would place on a dedicated and successful military effort. "Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. Moreover, as explained above, requiring such constitutional protections would oddly place non-citizen combatants in a more protected state than this country's own soldiers. *Id.* at 783.

Consequently, according non-citizen enemy combatants rights arising out of the Constitution, the Geneva Convention, and military courts-martial will substantially impair the ongoing and necessary military operations against al Qaeda. Such interference will occur on the battlefield and in the planning and management of the Armed Forces. These constitutionally unnecessary procedural rights hamper the Executive's ability to wage war successfully against al Qaeda. *See id.* at 774 ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE* AND MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS FOR WANT OF JURISDICTION[1]

Amici curiae are former federal judges profoundly concerned about preservation of the role of the judiciary in our constitutional system and, in particular, with ensuring that this Court remain open to hear claims by individuals of unconstitutional action by the elected branches of Government, a final check put in place by the Framers to protect the individual from the otherwise unconstrained power of government. Hon. Shirley M. Hufstedler served as a Judge of the United States Court of Appeals for the Ninth Circuit from 1968 to 1980. She subsequently served as United States Secretary of Education and is now Senior of Counsel to Morrison & Foerster in Los Angeles. Hon. William A. Norris served as a Judge of the United States Court of Appeals for the Ninth Circuit from 1980 to 1997. He is now Senior Counsel to Akin Gump Strauss Hauer and Feld LLP in Los Angeles.

This Court granted certiorari in this case on November 7, 2005. On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005 (the "DTA," the "Act," or the "statute"), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739. By its terms it does not affect the appellate jurisdiction of this Court, and its language, structure and history indicate that it has no application to pending cases. Nonetheless, on January 12, 2006, Respondents (the "Government") filed a motion seeking dismissal of the instant action under that statute for want of jurisdiction.

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[1] In compliance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici seek leave of this Court and submit this brief solely to aid this Court in ruling upon Respondents' motion to dismiss for want of jurisdiction. *Amici* have not and do not urge this Court to rule in any particular way on the merits of this appeal, nor do they seek to participate as *amici* on the merits. They believe, however, that it is of utmost importance to the continued role of this Court, to the separation of powers bequeathed to us by the Framers as a check on tyranny, to the very rule of law, that, having granted certiorari, this Court hear this appeal. In this sense they speak as friends of the Court, as *amici curiae*, in the literal sense.[2]

BRIEF *AMICI CURIAE*

INTRODUCTION

Properly construed, Title X of the Detainee Treatment Act of 2005 does not divest this Court of jurisdiction over this case. It has no effect on pending cases. And it does not affect the appellate jurisdiction of this Court on the facts of this case. If the statute were ambiguous, it should be construed to have no such application in order to avoid the grave constitutional questions that would be raised

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[2] The Rules of this Court are skeletal with respect to motions practice before it, see Robert L. Stern, et. al, Supreme Court Practice, §16.1, at 636 (8th Ed. 2002); see also id. (noting that ordinarily "motions . . . do not play an important part in Supreme Court practice"), and contain no provisions addressing the proper procedure for participation by *amici* on a motion like that now before the Court. The instant motion presents an unusual, perhaps unique, circumstance where a substantial legal question has been raised in a motion to dismiss for want of jurisdiction. Consequently, *amici* seek this Court's leave to file this brief. In the parallel circumstance in which the profoundly important questions presented by the DTA are now coming before the United States Court of Appeals for the District of Columbia Circuit that court has issued a blanket order to permit the participation of *amici curiae* at the motion stage. See *Boumediene v. Bush*, No. 05-5062, *sua sponte* Per Curiam Order (CADC January 27, 2006).

by a congressional attempt to strip this Court of jurisdiction over this case and the federal courts of jurisdiction over a broad range of federal constitutional claims. Finally, though, if the statute were construed to oust jurisdiction in this case the present motion would, nevertheless, have to be denied because if that is what it means, §1005 of the Act violates basic constitutional precepts and may not be enforced to prevent this Court from hearing the instant case. Four parts of the Constitution each independently require that this Court remain open to hear the claim of constitutional right brought here: The Suspension Clause of Art. I, Sec. 9; Article III; the Due Process Clause of the Fifth Amendment; and the Equal Protection Component of that Clause. It is these constitutional provisions with which this brief is primarily concerned.

ARGUMENT

I. THE ACT DOES NOT BY ITS TERMS DIVEST THIS COURT OF JURISDICTION OVER THIS CASE.

A. As Petitioner explains in his brief in opposition to the instant motion, the DTA does not deprive this Court of jurisdiction over this appeal. Its language and structure make clear that, though the Act "take[s] effect on the date of the enactment of the Act," it does not apply to most claims, including this one, pending on or after the date of enactment. See DTA §1005(h)(1),(2) (making clear that only certain provisions of §1005 apply to restrict only certain "claim[s] . . . pending on or after the date of the enactment of this Act").

Further, it is beyond peradventure that the language of the statute was chosen precisely to avoid an explicit statement that it would apply to pending cases. See, e.g., Wallach, "Graham Amendment and Guantanamo," New York Law Journal, Dec. 29, 2005 (describing removal from the Graham Amendment of language stating explicitly that it would apply to pending cases). Thus, even if the language that Congress used seemed *clearly* to imply that the statute applied to pending cases, given what is known of the reason

the language was chosen – to eliminate the explicit language applying the statute to pending cases – this Court would have an obligation to read it not to apply in this pending case. The *only* appropriate judicial role in statutory interpretation is to give effect to the will of Congress. In the face of the *knowledge* that the statute was indeed meant not explicitly to oust this Court's jurisdiction over this very case, it would be a grave miscarriage, indeed a usurpation of the legislative role, to interpret the statute to reach the contrary result. Cf. Stephen Breyer, Active Liberty 93-94 (2005). Indeed, this Court's doctrines accommodate such circumstances to assure that such a result never occurs. See, *e.g.*, *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (citation omitted) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'").

B. Dismissal for want of jurisdiction would, in any event, not be proper even were this Court to accept the Government's proposed construction of the statute's applicability to pending cases because this case is not pending in, and will not necessarily be returned to, the district court. By its terms, the statute *does not purport to eliminate this Court's appellate jurisdiction over this case.* This is, therefore, not a case like the deeply controversial *Ex Parte McArdle*, 74 U.S. 506 (1868), where Congress passed a law stating that so much of an earlier law "as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed." See Act of March 27, 1868, 15 Stat. 44.

This statute applies only to courts exercising jurisdiction under 28 U.S.C. §2241, as the district court did, to "hear or consider" applications for a writ of habeas corpus. That court reached its final judgment before the date of enactment of the statute. It is uncontested that that court

was empowered to hear this case when it did so. Indeed, if the Government had not appealed, it would have no argument that the judicial decision of the district court in this case had been – or could be – reversed by the action of the Congress here. See *Plaut v. Spendthrift Farms*, 514 U.S. 211, 226-27 (1995) (Scalia, J.) (Article III forbids legislative interference with final judgments of federal courts). The Court of Appeals exercised jurisdiction under 28 U.S.C. §1291 and this Court now exercises jurisdiction under 28 U.S.C. §1254. Neither exercised jurisdiction under §2241. There can thus be no contention that either court's jurisdiction is affected by the terms of the statute. Nor does the statute purport to change the substantive law applicable to Petitioner's case. Dismissal for want of jurisdiction therefore would be inappropriate.

Were this case to require a remand to the district court for further proceedings, the Government is probably correct that, if its reading of the statute were accepted, dismissal would make sense. See Respondents' Motion at 13 n. 6. But a return for further proceedings in the district court is something that neither party has sought. The district court found for Petitioner and entered final judgment. The Court of Appeals reversed. If the judgment below is affirmed, as the Government urges, this Court will issue an order of affirmance and that will be the end of the case. And if the judgment below is reversed, the Court of Appeals will ultimately enter an order affirming the judgment of the district court and that will be the end of the case.

In either event, no court deprived of habeas jurisdiction by the terms of the Act, even on the Government's reading of the statute, will have this case before it on remand. Since this Court's jurisdiction is not affected by the statutory text, and since it is irrelevant whether the district court would have jurisdiction to hear the

case were it brought today, this Court should not and properly may not dismiss for want of jurisdiction.[3]

C. Finally, if there were doubt about whether the statute applied to eliminate this Court's jurisdiction, this Court would nonetheless be required to construe the statute not to apply to this case in order to avoid the grave constitutional questions that would be raised by such a statutory elimination of jurisdiction. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *Ex parte Endo*, 323 U.S. 283, 300 (1944).[4] The remainder of this brief will take up those questions and will demonstrate that if §1005 applied to eliminate this Court's jurisdiction in this case it would not merely raise grave constitutional questions, it would violate fundamental precepts enshrined in the

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[3] For related reasons, a remand to address the DTA – again unsought by Respondents – would not be appropriate. Only this Court can answer the question of the applicability of the statute to this Court's exercise in a pending case of its certiorari jurisdiction under 28 U.S.C. §1254. A remand also could unintentionally affect this Court's authority to address the merits of this case. It is conceivable, for example, that, while this appeal is, in fact, properly before this Court, on a remand, dismissal before a lower court might be proper. There would in such a case be no mechanism permitting this Court to review the merits of the case after remand, even though this case is properly before this Court, and it has granted certiorari on the merits question, now.

[4] The words from Sen. Kyl on the floor of the Senate quoted by the Government cannot change the meaning of the statute. See Respondents' Motion at 14 n. 7. In any event, at most they suggest that the compromise language was supported by some legislators precisely because it was thought ambiguous with respect to pending cases. That is, they were deliberately attempting to punt to this Court the question of the applicability of the statute to this case. Given the canons described in the text, any such ambiguity, too, would require this Court to construe the statute not to oust its jurisdiction.

Constitution. Therefore, whether on the basis of its text, of the doctrine of constitutional avoidance, or because the statute applies but the Constitution itself requires it, this Court should deny Respondents' motion to dismiss.

II. TO THE EXTENT IT DIVESTS COURTS OF HABEAS JURISDICTION, §1005 VIOLATES THE SUSPENSION CLAUSE.

To begin with, §1005 purports to divest every "court, justice, or judge" of "jurisdiction to hear or consider" any "application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." See DTA §1005(e)(1). This applies to those few who will be tried by military commission as well as the hundreds of others subjected to indefinite detention there on the President's say-so. This statute marks the first time in over one hundred years that Congress has seen fit to suspend the writ of habeas corpus with respect to prisoners held by the federal government.

As an initial matter, this provision implicates the Suspension Clause. This Court has held that aliens held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to bring petitions for a writ of habeas corpus. *Rasul v. Bush*, 542 U.S. 466 (2004). This Court has not decided whether the Suspension Clause is implicated by suspensions of the writ only as it existed in 1789 or as it exists today. See *Swain v. Pressley*, 430 U.S. 372, 380 and n. 13 (1977) (citing Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 171 (1970)) (noting that "Judge Friendly observed that '[w]hat Congress has given, Congress can *partially* take away'" an observation "more cautious than the conclusion that Congress may *totally* repeal all post-18th century developments in this area of the law") (emphasis added by the Court); see also *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (assuming "that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789").

Although the implication of Judge Friendly's words is that "Suspension" refers to habeas corpus as the writ exists today, the writ sought here is within the scope of the writ as it existed in 1789. The petition in this case, brought by Petitioner, who is a federal prisoner, lies within the terms of the very first grant of habeas authority to the federal courts, the Judiciary Act of 1789, which provided that federal courts could grant writs of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, Sec. 14, 1 Stat. 82; see *Felker*, 518 U.S. at 659 (discussing the history of the scope of federal habeas corpus). The petition at issue here lies at the "historical core" of the writ, raising an objection to "the legality of Executive detention." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). "The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial." *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result). And, as the Court has explained, the writ was available to noncitizens as well as citizens:

> The writ of habeas corpus has always been available to review the legality of executive detention. See *Felker*, 518 U.S. at 663; [*Swain*], 430 U.S. at 380, n. 13; *id.* at 385-386 (Burger, C. J., concurring); [*Brown*], 344 U.S. at 533 (Jackson, J., concurring in result). . . . Before and after . . . 1875 . . . that jurisdiction was regularly invoked on behalf of noncitizens. . .

St. Cyr, 533 U.S. at 305. "At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm." *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (citing *inter alia R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing, but denying, the habeas petition of an alien deemed a prisoner of war because he was captured aboard an enemy French privateer)).

The Court just two Terms ago concluded that the judicial power of the federal courts in habeas cases extends